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Supreme Court, U.S.
FILED
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NO. _____

IN THE

Supreme Court of the United States

STEPHEN C. ORR

Petitioner

vs.

WAL-MART STORES, INC.,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL APPENDIX

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FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
01 JUL -6 PM 2:24
GARY D. McFARLAND
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

STEPHEN C. ORR,	)	
	)	
Plaintiff,	)	7:99CV5020
	)	
v.	)	
	)	
WAL-MART STORES, INC.,	)	ORDER
	)	
Defendant.	)	
	)	

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Defendant's motion for summary judgment (Filing No. 31) is granted;

2) Plaintiff's complaint (Filing No. 1) is dismissed with prejudice.

DATED this 6th day of July, 2001.

BY THE COURT:

Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court

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IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

STEPHEN C. ORR, Plaintiff,	)	7:99CV5020
v.	)	
WAL-MART STORES, INC., Defendant.	)	MEMORANDUM OPINION

This matter is before the Court on defendant's motion for summary judgment (Filing No. 31). Plaintiff originally filed this action on October 19, 1999, alleging violations of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq., and the Nebraska Fair Employment Act, Neb. Rev. Stat. §§ 48-1101-1126. After considering the briefs and evidence submitted by the parties, the Court will grant defendant's motion for summary judgment.

I. Standard for Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and other evidence, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). This evidence is viewed in the light most favorable to the non-moving party. *Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083, 1086 (8th Cir. 2000). The mere

existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Guinness Import Co. v. Mark VII Distrib., Inc.*, 153 F.3d 607, 611 (8th Cir. 1998). However, disputes over facts that might affect the outcome of the lawsuit under the governing law will properly preclude entry of summary judgment. *Guinness Import*, 153 F.3d at 611.

II. Background

The plaintiff, Stephen C. Orr, is a pharmacist licensed in both Nebraska and South Dakota. In December of 1997, plaintiff was hired by the defendant, Wal-Mart, as a pharmacist in a new store opening in Chadron, Nebraska. During plaintiff's interview with Rick Coleman, plaintiff informed Coleman that plaintiff was diabetic and needed to eat regular meals and snacks. Coleman told plaintiff he could do so.

Plaintiff claims that he was authorized to close the pharmacy for one-half hour to eat an uninterrupted lunch. Defendant denies this allegation and, in fact, claims that plaintiff was specifically informed that he was not able to leave the pharmacy or close it during operating hours. This factual dispute does not effect the outcome of this lawsuit.

In February of 1998, John Foss, plaintiff's District Manager, was informed that plaintiff was closing the store over the lunch hour. Foss reiterated defendant's policy regarding

single-pharmacist stores: the pharmacy could not be closed during the lunch hour. Despite the conversation, plaintiff continued to close the pharmacy during lunch. On March 5, 1998, Foss issued a Performance Coaching to plaintiff, warning him of termination if he continued to close the pharmacy. Plaintiff's employment was ultimately terminated on May 12, 1998, for violating the lunch policy. Foss issued an exit interview form, which plaintiff refused to sign.

III. Discussion

The Americans with Disabilities Act ("ADA") prevents certain employers from discriminating against qualified individuals with a disability because of the disability. 42 U.S.C. § 12111(a); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477-78 (1999). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Finally, the statute defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[1] 42 U.S.C. § 12102(2). Thus, the Court's

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[1] The statute also provides two other definitions for disability, which have not been asserted by the plaintiff, and are thus not pertinent to this opinion.

initial inquiry is whether the plaintiff is disabled as defined by the ADA.

Whether an individual is disabled is analyzed on a case-by-case basis, taking into account measures which mitigate an individual's impairment. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475, 483 (1999). The Supreme Court's analysis in *Sutton* specifically states "[a] disability exists only where an impairment 'substantially limits' a major life activity, not where it 'might,' 'could,' or 'would' be limiting if mitigating measures were not taken." *Sutton*, 527 U.S. at 482. Finally, the Court stated that an individual is not per se disabled because he is diabetic; rather, the individual must demonstrate that his condition impairs his daily activities. *Id.* at 483-84.

The parties do not dispute that diabetes is a physical impairment. However, defendant argues that potential limitations caused by plaintiff's diabetes do not demonstrate that plaintiff is disabled within the meaning of the ADA and its implementing regulations. Defendant also argues that plaintiff has only suffered temporary impairments. The plaintiff, on the other hand, claims that he is disabled in one or more major life activities because of his diabetes. Specifically, he claims that his condition "can effect (sic) his ability to see, speak, type, read and walk." (Plaintiff's Brief in Opposition at 10). In addition, plaintiff claims that he is limited in the activity of

working and that diabetes can affect his awareness, strength and coordination.

According to the regulations, "substantially limits" means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1630.2(j)(2). The regulations also list factors to be considered when determining if an individual is substantially limited in a major life activity: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent long-term impact, or the expected permanent long-term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). *See Kellogg v. Union Pacific Railroad Co.*, 233 F.3d 1083, 1086-87 (8th Cir. 2000) (using the EEOC's definition of "substantially limited" and the factors associated with making a determination of substantially limited). The United States Court of Appeals for the Eighth Circuit has previously held that temporary limitations or brief impairments of an activity are not sufficient to rise to the

level of substantial limitation; rather, the impairment must be permanent or long-term. *Anderson v. North Dakota State Hosp.*, 232 F.3d 634, 636 (8th Cir. 2000).

Turning to plaintiff's articulated limitations, the undisputed evidence demonstrates that plaintiff only has temporary limitations because the limitations are largely controlled by plaintiff's diet and insulin injections. During his deposition, plaintiff stated that on the few occasions when his blood sugar level is either high or low, he is not prevented from doing any activities. Rather, plaintiff states that the activities generally take more time and concentration. Furthermore, when plaintiff's blood sugar is low, high caloric intake stabilizes the condition within three to five minutes. Plaintiff also mentioned episodes involving seizures and unconsciousness. However, these episodes often occur at night. In fact, he stated that often he does not know he has fallen unconscious until he wakes in the morning to go to work, and he feels overtired. Plaintiff also stated that he has never missed work for high blood sugar and has only missed work because of low blood sugar on an occasion in which it caused unconsciousness. Plaintiff has never lost consciousness from low blood sugar while working.

The limited number of episodes, as well as their limited duration and short-term impact, are insufficient to meet

the definition of disability and "substantially limited" under the ADA and its implementing regulations.[2] Plaintiff, however, also claims in his complaint that he is substantially limited in his ability to work.[3] The EEOC adopted independent regulations regarding major life-activity of working.

According to the regulations on working,

> [t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). Plaintiff was employed both prior and after his tenure with the defendant, and has not presented any evidence that he is limited in his ability to perform any job. *See Berg v. Norand Corp.*, 169 F.3d 1140, 1145 (8th Cir. 1999) (stating that a plaintiff must establish that he/she is

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[2] *Cf. Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 925-26 (7th Cir. 2001) (holding that plaintiff who was unable to control diabetes despite diet and insulin at least raised an issue of fact as to whether he was limited in a major life activity. "The particular nature of [plaintiff's] diabetes, even after treatment, could be said to significantly impair his daily activities. . .").

[3] Plaintiff does not specifically address this limitation in his brief in opposition to the motion for summary judgment.

substantially limited from performing a class of jobs or a broad range of jobs from different classes).

Plaintiff also claims that defendant violated the Nebraska Fair Employment Practices Act ("NFEPA"). Nebraska's statute was modeled after the federal anti-discrimination statutes, and as such, is interpreted similarly. *See City of Fort Calhoun v. Collins*, 500 N.W.2d 822 (Neb. 1993) (following federal court decisions construing federal Title VII legislation). In addition, the definitions of "disability" and "qualified individual with a disability" essentially mirror the federal definitions. Neb. Rev. Stat. §§ 48-1102(9) and (10)(a). Thus, plaintiff's state law claim fails for the same reasons that his ADA claim fails.

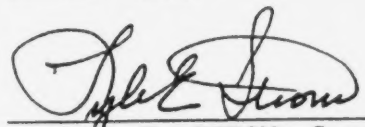
IV. Conclusion

Based on the foregoing, the Court finds that defendant's motion for summary judgment should be granted. Plaintiff has failed to establish that he is disabled as that term is defined by the ADA and regulations and NFEPA. Accordingly, the Court need not address the other prima facie

elements. A separate order will be entered in accordance with this memorandum opinion.

DATED this 6th day of July, 2001.

BY THE COURT:



LYLE E. STROM, Senior Judge
United States District Court